IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 26-10-2007

CORAM

THE HONOURABLE MR.JUSTICE M.CHOCKALINGAM

W.P.No.43497 of 2006
and
MP Nos.2 and 3 of 2006 and 1 of 2007

M/s.Metro Machinery Traders
No.42, 2nd Floor, Nishant Kunj
Pitampura, Delhi 110 088
rep. By its Partner Ram Kishan .. Petitioner

vs

1.Union of India
rep. By its Secretary
Ministry of Coal & Mines
Central Secretariat, New Delhi
2.M/s.Neyveli Lignite Corporation
Limited,
(A Government of India Enterprises)
Disposal Wing, Marketing Branch
Card Complex,
Office of the Dy. General Manager
Chemical Units, Neyveli 607 807.
3.Neyveli Lignite Corporation
Limited,
having its Regd. Office at
Neyveli House
rep. By its Dy. General Manager
Chemical Units
135, Periyar E.V.R. High Road
Kilpauk, Chennai 10.
4.State Trading Corporation of
India Ltd.,
having its Regd. Office
at 1, Toistory Marketing
New Delhi 3.
5.M/s.Metal Scrap Trading
Corporation
(A Govt. of India Enterprises)
Ranka Chambers, 31, 1st Floor
Cunningham Road, Bangalore 560 052.
6.The Director
Directorate of Revenue Intelligence
No.25, Gopalakrishna Iyer Road
T.Nagar, Chennai 17. .. Respondents

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Writ petition filed under Article 226 of the Constitution of India praying for a writ of certiorarified mandamus calling for the records relating to Sale Order/Acceptance Letter No.MSTC/S/NLC/EA-14/2005-06/101/008 dated 1.4.2005 issued by the fifth respondent and quash the same and direct the second and third respondents to return the amount of Rs.163,49,96,511/- (Rupees One hundred and sixty three crores forty nine lakhs ninety six thousand five hundred and eleven only) after deducting the amounts already received, with interest at the rate of 18% from 30.4.2005 to the petitioner.

For Petitioner : Mr.Rawal, Senior Counsel,
for M/s. Murthy & Varan

For Respondents : Mr.P.Wilson
Assistant Solicitor General
for RR1 and 6

Mr.N.A.K.Sarma for RR2 & 3

Mr.R.K.Anand,
Senior Counsel and
Mr.D.Roy Chondri,
Senior Counsel
for Mr.S.Umapathy for R4

No appearance for R5

ORDER

The main writ petition itself is taken up for consideration following the request made by the Counsel on either side.

2.Invoking the writ jurisdiction of this Court, the petitioner has sought for a writ of certiorarified mandamus to call for the records relating to Sale Order/Acceptance Letter No.MSTC/S/NLC/EA-14/2005-06/101/008 dated 1.4.2005 issued by the fifth respondent, quash the same and direct the second and third respondents to return the amount of Rs.163,49,96,511/- after deducting the amounts already received, with interest at the rate of 18% from 30.4.2005 to the petitioner.

3.The affidavit in support of the petition and the counter affidavits of the respondents 2, 3 and 4 are perused. The Court heard the learned Counsel on either side.

4.The following would emerge as facts admitted:

(a) The petitioner is a partnership firm. The respondents 2, 3 and 4 are owned and managed by the Government of India while the respondents 2 and 3 are under the control of the first respondent. Likewise, the respondents 4 and 5 are under the control of the Union of India. Thus, the respondents 2 to 5 are Public Companies under the control of the Government of India. The Neyveli Lignite Corporation (hereinafter referred to as NLC) issued two communications both on 24.5.2004, one addressed to the Superintendent of Central Excise, Virudhachalam, and the

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other to the Commissioner of Central Excise and Customs, Pondicherry, regarding the disposal of the fertilizer plant. On 7.6.2004, the Superintendent of Central Excise, Virudhachalam, requested the second respondent to inform the payment of Customs Duty and Central Excise Duty and to pay the arrears of duty/penalty/fine/demand pending as on date. On 30.6.2004, the NLC replied to the Superintendent of Central Excise, Virudhachalam, that the machinery, equipment, spares, etc., required for the fertilizer plant, were procured only after paying the Customs/Excise Duty as applicable. On 2.7.2004, the Superintendent of Central Excise, Virudhachalam, requested the second respondent to furnish the details of the machinery, imported with partial/full exemption and bills of entry for the same. The same was furnished by the second respondent on 10.7.2004. While the matter stood thus, the fifth respondent issued an advertisement for auction notice No.MST.BLR/Neyveli Lignite Corporation Ltd., 14/Neyveli/2004/05/1025(1674) alleging that the respondents 2 and 3 being owner in possession of the machinery, intended to sell the fertilizer plant, machinery etc., as installed in its factory at Neyveli within its disposal. The fifth respondent by its tender notice dated 27.1.2005, issued general terms and conditions. The petitioner made its offer, and the same was accepted by the fifth respondent at the auction held on 1.4.2005. The fifth respondent issued confirmation of acceptance of the petitioner's offer for Lot No.01(one) in its letter dated 1.4.2005 on "As is where is basis". The earnest money deposit of Rs.13,20,00,000/- paid by the petitioner, was to be kept as security deposit as per the terms and conditions against the sale value. The petitioner deposited a sum of Rs.50 lakhs which was the condition precedent for tender offer. The petitioner's bid amount of Rs.132.01 Crores was found to be the highest and was accepted by the fifth respondent. Following the same, the petitioner deposited a sum of Rs.149,79,69,511/- in favour of the second respondent payable at Neyveli on 29.4.2005 towards the full payment. The fifth respondent issued the sale order/acceptance letter whereby the auction sale was confirmed on "As is where is basis".

(b) On 11.5.2005, the petitioner took factory license. A delivery order was issued in favour of the petitioner on 18.5.2005 wherein the period was mentioned as 370 days commencing from 19.5.2005 and ending with 23.5.2006. The petitioner started dismantling on 19.5.2005 itself. The second respondent sought the permission from the Chief Inspector of Boiler, Madras, to condemn the Waste Heat Boiler on 18.10.2005 and 19.12.2005 respectively. Accordingly, the Chief Inspector of Boiler permitted for scrapping the Waste Heat Boiler by a communication dated 22.12.2005. The second respondent NLC requested the Chief Inspector of Boiler to declare the Boiler as scrapped. The petitioner requested the second respondent to extend the time to finish the work. On 22.5.2006, at the instance of the fourth respondent, an interim order came to be passed by the Delhi High Court in OMP No.232 of 2006, which restrained the other party from making sale, transfer or alienation of the rights of the fertilizer plant and also restrained the second respondent from paying any amount of EMD and security deposit to the petitioner herein and also appointed an Advocate Commissioner. On 7.6.2006, the Director of Revenue Intelligence (DRI), Trichy, intimated NLC to arrange on-the-spot verification on 13.6.2006. On 12.6.2006, the Officials of the D.R.I. Visited NLC and perused certain files. The Advocate Commissioner appointed by the Delhi High Court, visited the fertilizer plant on 15.6.2006, and

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prepared the inventory report. On 16.6.2006, the DRI conducted an enquiry and obtained a statement from the officials of the second respondent. On 20.6.2006, the DRI informed NLC that the goods imported under concessional rate of Customs Duty, and used in the revamping of the fertilizer unit, should not be disposed of or removed.

(c) The second respondent filed a counter affidavit before the Delhi High Court. Following the same, the Delhi High Curt passed an order appointing the fourth respondent S.T.C. as Receiver and directed NLC to facilitate the sale proceedings. The order of the Delhi High Court was intimated to the sixth respondent DRI by the second respondent. The DRI instructed the second respondent NLC to strictly adhere to the contents of their letter dated 20.6.2006, which is referred to above. The second respondent permitted the petitioner to take delivery of the materials under the control of the Court Receiver. On 1.9.2006, the petitioner sent a legal notice to the second respondent. The second respondent informed the petitioner not to remove the imported materials and remove the remaining materials without any delay. Again, the petitioner sent a legal notice to the second respondent and requested to refund the amount as referred in the legal notice dated 1.9.2006. The Delhi High Court passed an order restraining the respondents 2 to 8 therein including the petitioner herein, from transferring, alienating or encumbering the properties. The second respondent requested the sixth respondent to release the goods detained, and undertook to furnish bank guarantee. On 4.11.2006, the NLC sent a reply to the petitioner. The second respondent furnished a bond for Rs.23 Crores and a bank guarantee for Rs.3 Crores to the sixth respondent. The NLC informed the fourth respondent who is the Receiver appointed by the Delhi High Court, that all the goods may be removed as per the orders of the Delhi High Court. Under such circumstances, the instant writ petition came to be filed before this Court for the said relief.

5.Advancing his arguments on behalf of the writ petitioner, the learned Senior Counsel would submit that in the instant case, the petitioner is entitled for the writ of certiorarified mandamus to which it is entitled to; that following a tender notice, which was issued by the fifth respondent for the sale of the fertilizer plant machinery as installed in the factory of the second respondent, the bid was made by the petitioner herein; that it is pertinent to point out that in the Tender Schedule, there was no mention that any one of the machineries found in the plant, which were part and parcel of the subject matter, was imported; that while there were notifications of the year 1999 and 2000 subject to which terms and conditions the machineries were imported, they were not also stated in the tender notice; that as per the notifications issued, which would be binding on the second respondent, the imported goods should be used only for the purpose for which it was actually imported by the second respondent; that no question of sale of the same would arise; that only on that condition, there was a concession that was given originally; that if the NLC was to sell the property in public auction, it should have obtained permission; but, it was not done so; that even without doing so, the second respondent through the fifth respondent has made the auction notice, and thus, in the instant case, if those facts were brought to the notice of the petitioner, the petitioner would not have made bid for the same, and he would have avoided purchasing the machinery; that there was

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concealment of all the necessary facts, which could be termed only as fraud as one defined under the Contract Act; that further, it is a case where all these facts which were within the special knowledge of the second respondent, were completely suppressed; that if to be so, while there was a notification issued, in breach of the terms and conditions of the notification, the property was sold, and thus, it would be quite clear that it was a case where as per the provisions of the Customs Act, the properties could not be sold as there was a notification under the provisions of that Act; that while those provisions prohibited the sale of those goods and the sale of the machinery, such a tender notice was issued, and auction has been conducted, and hence, the entire contract itself is void ab initio; and that once the contract itself is void ab initio, to start with, the second respondent has to necessarily pay back the entire amount of Rs.163 crores which has been paid by way of earnest money which has been subsequently converted as part of consideration and the subsequent payment of Rs.143 crores which has been received.

6.Added further the learned Senior Counsel that in the instant case, after the contract was entered into, the petitioner entered into an agreement with the fourth respondent State Trading Corporation of India (hereinafter referred to as STC), on the basis of which, the entire money has flown from the hands of STC; that the officials of the DRI have issued notices and have inspected the spot; that there have been communications continuously, which would also be indicative of the fact that there was concealment of those facts, and thereby, the second respondent has committed fraud; that the same persisted continuously; that the NLC has been keeping quiet all along and has been silent spectator; that they have allowed the petitioner and the fourth respondent to act so; that under the circumstances, they have made unlawful enrichment; that it is true that as per the terms and conditions of the agreement, there is a clause namely Clause 59, speaking of the arbitration; that in the instant case, there is no question of the matter to be referred to arbitration that would arise for the reason that it is a case where the entire contract is vitiated and has got to be treated as void ab initio; that in such circumstances, no question of giving effect to Clause 59 for arbitration between the parties as put forth in their counter, would arise; and that it is not a case, where it could be referred to arbitration.

7.Added further the learned Senior Counsel that though at the first instance, the relief sought for by the petitioner, is one for a direction to the NLC to return the entire sale consideration, it cannot be considered to be as either a civil dispute or a case where the party can be directed to go to a Court of civil law and that too in a given case like this, where a fraud has been played, and it is evident; that under the circumstances, the entire contract becomes vitiated and void ab initio; that in such circumstances, there must be a direction for return of the entire sum; that in the case on hand, the facts as found in the materials available, are admitted; and that in view of the same, there is no question of referring the matter to the arbitration or directing the party to go to the Court of civil law that would arise.

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8.The learned Senior Counsel would further add that in this case, originally, in the year 1999 and 2000, two notifications were issued; that in breach of the notifications, the property has been brought for auction, and it has been sold; that accordingly, the entire consideration was paid; that all these proceedings have been initiated by the DRI subsequently; that the properties have actually been confiscated; that the proceedings are yet pending for assessment; that now, it would be futile on the part of the second respondent to contend that either it could be referred to arbitration or the party has to go to the Court of civil law, and under the circumstances, the petitioner is entitled for the refund of the money.

9.Added further the learned Senior Counsel that in a given case, even though it is a contractual obligation, the Court can exercise its writ jurisdiction and decide the same; that even for the monetary claim, it could be done; that in a case like this where fraud has been played, the Court must come to the rescue of the petitioner and pass suitable orders thereby setting aside the entire contract and issuing a direction for the return of the entire money; that admittedly, following the contract, the property worth about Rs.38 Crores, have been removed from the plant; that under the circumstances, that portion could be deducted from the entire consideration originally paid; that in this case, the NLC cannot be allowed to say that what was the actual goods that were removed was not known, because the goods were carried and transported from the plant; that every time when the goods were being removed, they were actually verified and countersigned by the Officials of the second respondent, and hence, they cannot plead no knowledge; that it was to the extent of Rs.38 Crores which is admitted by the petitioner; that the said amount could be deducted in the entire amount originally paid, and the rest could be ordered to be paid, and accordingly, a writ has got to be issued.

10.In support of his contention, the learned Senior Counsel for the petitioner relied on the following decisions:

(i) (2005)8 SCC 618 (SBP & CO. V. PATEL ENGINEERING LTD.);

(ii) (2000)4 SCC 272 (WELLINGTON ASSOCIATES LTD. V. KIRIT MEHTA);

(iii) (2000)4 SCC 285 (MOLAR MAL V. KAY IRON WORKS (P) LTD.);

(iv) AIR 1924 MADRAS 336 (ANGLO-PERSIAN OIL COMPANY V. P.S.PANCHAPAKESA AIYAR);

(v) AIR 1924 CALCUTTA 796 (MANINDRA CHANDRA V. LOW & CO. LTD.);

(vi) AIR 1981 ANDHRA PRADESH 410 (RAJA PICTURE PALACE V. M.JAGGA RAO);

(vii) AIR 1978 CALCUTTA 407 (GENERAL ENTERPRISES V. JARDINE HANDERSON LTD.);

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(viii) AIR 1977 CALCUTTA 130 (NITYA KUMAR V. SUKHENDU CHANDRA);
(ix) 109 (2004) DELHI LAW TIMES 415 (SC) (ABL INTERNATIONAL LTD.

V. E.C.G.C. OF INDIA LTD.);

(x) 1970 U.J.(S.C.) 290 (THE D.F.O. SOUTH KHETRI & OTHERS V. RAM SANEHI SINGH);

(xi) AIR 1985 SUPREME COURT 1147 (RAM AND SHYAM CO. V. STATE OF HARYANA);

(xii) (1998)8 SCC 1 (WHIRLPOOL CORPORATION V. REGISTRAR OF TRADE MARKS, MUMBAI AND OTHERS);

(xiii) 2002(9) SCALE 724 (HARBANSLAL SAHNIA AND ANOTHER V. INDIAN OIL CORPN. LTD. & OTHERS);

(xiv) AIR 1988 SUPREME COURT 1074 (INDIRA KAUR V. SHEO LAL KAPOOR); and

(xv) AIR 1984 SC 1401 (STATE OF U.P. V. DIST. JUDGE, UNNAO).

11.The learned Counsel for the second respondent would submit that in the case on hand, the writ petition has got to be dismissed as one not maintainable; that the case of the petitioner, according to its Counsel, centers round upon the fraud alleged to have been committed by the second respondent, but that is not so; that after closing the fertilizer plant and after following the procedural formalities, the Superintendent of Central Excise, Virudhachalam, and the Commissioner of Central Excise and Customs, Pondicherry, were informed by proper communications on 24.5.2004, that it has got a proposal for disposing of the fertilizer plant on "As is where is basis"; that both the authorities required the second respondent to inform whether there was any arrears of duty payable by the NLC; that a reply was given by the second respondent on 30.6.2004 stating that the fertilizer plant was procured only after paying the customs and excise duty as applicable; that a communication was addressed by the Central Excise Department directing the second respondent to furnish the details of the machinery imported, along with all details and bills of entry, etc.; that accordingly on 10.7.2004 i.e., about 9 months prior to the auction notice, all particulars and details were furnished before the department; but, the department did not pass any order whatsoever; that the case of the second respondent from the commencement of the import till today continues to be that it need not make any payment of duty, nor is it liable to pay any duty; that at the time of import of those machineries, duties were actually paid; that even before calling for an auction, the second respondent took all precautionary methods in order to ascertain certain facts from the department; that also at the first instance, it was the second respondent who addressed a communication in the month of May 2004 to both the departments informing them about the disposal of the fertilizer plant; that had it been the intention of the second respondent to conceal any fact, such a procedure could not have been followed, and thus, the second respondent put the Department of Central Excise and Customs on notice as to the disposal; that following the same, there were

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communications between the second respondent and also the Department of Central Excise and Customs; that even the stand that was taken by the second respondent that the entire duty was actually paid at the time of the importing those machineries, was continued; that when the necessary particulars were called for, the NLC gave a reply along with all the particulars of machineries and also stated that the duties were paid; and that under the circumstances, the bonafide of the second respondent cannot even be questioned.

12.The learned Counsel would further add that the fraud in law is a very strong term; that it requires concealment; that in this case, the petitioner has rested the case on the alleged fraud; that there is no concealment of fact; that had the second respondent made an attempt to conceal all the material facts, there was no necessity for bringing the matter to the notice of the department nine months earlier to the auction notice; that after all the necessary particulars were placed before the Department of Central Excise and Customs, there was no reply from their side; that under such circumstances, the second respondent presumed that no further duty was payable, and hence, it called for the auction; that in this case, the petitioner who had got the clear knowledge about the circumstances, came forward to purchase the property; that after the same, the petitioner was allowed to remove the machinery; that 370 days was the period within which the machinery should be taken; that for 369 days, it was operated; that only one day was left; and that at that juncture, the fourth respondent moved the Hon'ble High Court of Delhi and got an interim order.

13.Added further the learned Counsel that it is not in controversy that the petitioner had removed the machinery from the plant; that even as per the affidavit filed in support of the writ petition, the petitioner has admitted that the machineries to the extent of Rs.38 Crores have been removed; that even in the communication dated 20.3.2006 addressed to the NLC seeking extension of time, it has mentioned that 75% of the machineries have been removed; that it would be indicative of the fact that major part of the machinery have also been taken; that they have performed that part of the contract and had the benefit of 75% of the removal of those machineries; that under the circumstances, now, the petitioner cannot be allowed to state that the contract is void ab initio; that in this case, there is no material to indicate that any fraud has been committed or there is any concealment of fact, and under the circumstances, the contract cannot be said to be void ab initio; that a part of the contract has also been performed, and the other part could not be done; that if the contract after the execution, cannot be performed in view of the impossibility of performance of the contract, what is available for the petitioner is to ask for compensation, and he cannot ask for the return of the entire amount; that further, a reading of the terms and conditions would clearly reveal that there is a Clause namely Clause 59, which is meant for arbitration; that in this case, a reading of that Clause would clearly indicate that it is a case where it has got to be referred to arbitration; that in view of the fact that a part of the contract has been performed and the other part could not be performed

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because of impossibility of performance by the interference of the Department of Central Excise and Customs, now what is available for the petitioner is to go for arbitration as one found therein; and that since the contract is voidable, it cannot be said to be void ab initio.

14.Added further the learned Counsel that even under Sec.65 of the Contract Act, they can go for compensation, if they are really aggrieved; but, they cannot come forward invoking the writ jurisdiction of this Court, to direct the second respondent to return the entire amount which is the sale consideration; and that under the circumstances, the writ petition has got to be dismissed.

15.In support of his contentions, the learned Counsel relied on the following decisions:

(i) JT 2003 (6) SC 515 (HYTHRO POWER CORPORATION LTD. V. DELHI TRANSCO LTD.);
(ii) JT 2001 (9) SC 582 (STATE OF BIHAR AND OTHERS V. JAIN PLASTICS AND CHEMICALS LIMITED);
(iii) JT 2000 (8) SC 167 (KERALA STATE ELECTRICITY BOARD AND ANOTHER V. KURIEN E. KALATHIL AND OTHERS);
(iv) 2004-2-L.W. 244 (NIIT LIMITED V. ASHISH DEB AND ANOTHER);
(v) 2006(5) CTC 865 (THE G.M., NORTHERN RAILWAY V. THE METAL POWDER COMPANY LTD.); and
(vi) 2002(3) ARB. LR 60 (LEXICON FINANCE LIMITED V. UNION OF INDIA AND OTHERS).

16.The learned Senior Counsel for the fourth respondent would submit that in the instant case, following the auction sale, the petitioner sought for financial assistance from the fourth respondent STC; that pursuant thereto, Rs.149 Crores has actually been paid by way of a demand draft which was in the name of the NLC, and the same has been received; that when a communication was addressed to the petitioner stating that pending the removal of the machineries, the DRI has intervened and has also issued a show cause notice as if the goods were imported and duties have not been paid, and hence, the fourth respondent was constrained to file proceedings before the High Court of Delhi under Sec.9 of the Arbitration and Conciliation Act; that following the same, an Arbitrator has also been appointed; that the matter is actually in the hands of the Arbitrator; that if any order is to be passed by this Court to the effect that as per the request of the petitioner, the entire amount is ordered to be paid to the petitioner, the interest of the fourth respondent would be jeopardized; and that if an order is to be passed, the entire amount must be directed to be deposited before the Delhi High Court where the proceedings are pending.

17.The learned Senior Counsel would further add that after the contract was entered into between the petitioner and the fourth respondent, two of the Directors of the fourth respondent came over to the second respondent NLC where they came to know that as per the books of accounts, the value of the entire plant and machinery was only Rs.17.75 Crores; that there were discussions over the same as evident from the communications; but, at no point of time, the Officials of the second

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respondent whispered that there was any proceeding initiated or pursuant to the G.O. made by the department, the goods were imported, and it is pending from 1999 to 2000, and conditions were also imposed, and thus, all the proceedings were pending; that not even at one point of time, it was brought to their notice, but suppressed; and that it was a clear, willful and deliberate concealment of the material facts.

18.Added further the learned Senior Counsel that the fourth respondent is also a Public Sector Undertaking (PSU); that the second respondent is also a Public Sector Undertaking; that once the second respondent's Officials knew the fact that the money is to flow from the fourth respondent, a PSU, it was duty bound to bring to the notice; that had it been brought to their notice, the money would not have flown from the fourth respondent; that it would be quite clear that the second respondent was also a silent spectator and also colluded with the petitioner, and thus, the entire mount of Rs.149 Crores has flown from the fourth respondent to the second respondent; that in order to secure the money already given, proceedings have also been initiated, and the matter is pending before the Hon'ble High Court of Delhi; and that if an order is passed in this petition, the second respondent should be directed to deposit the same before the High Court of Delhi to the credit of the proceedings initiated by the fourth respondent before that Court.

19.In support of his contentions, the learned Senior Counsel relied on the following decisions:

(i) AIR 1959 SC 1362 (UNION OF INDIA V. KISHORILAL GUPTA);
(ii) AIR 1960 CALCUTTA 90 (SUWALAL JAIN V. CLIVE MILLS CO.);
(iii) (2207)5 SCC 692 (NATIONAL AGRICULTURAL COOP. MARKETING FEDERATION INDIA LTD. V. GAINS TRADING LTD.);
(iv) 2003 AIR SCW 3041 (OIL AND NATURAL GAS CORPN. LTD. V. SAW PIPES LTD.);
(v) (1989) 2 SCC 1 (ITC LIMITED V. GEORGE JOSEPH FERNANDES AND ANOTHER);
(vi) AIR 1968 SC 522 (NAIHATI JUTE MILLS V. KHYALIRAM); and
(vii) (2005) 7 SCC 605 (BHAURAO DAGDU PARALKAR V. STATE OF MAHARASHTRA AND OTHERS).

20.The learned Assistant Solicitor General for the respondents 1 and 6 would submit that there were two notifications issued namely 20/99 dated 28.2.1999, and 16/2000 dated 1.3.2000; that pursuant to the notifications and as per the terms and conditions of the notifications, the goods were imported; that it stipulates that the concession of duty was given on condition that it should be only for the purpose of using the materials by the NLC in its plant; but, subsequently, the properties were sold; that under the circumstances, they are expected to pay the duty what was actually payable; that there was no concession that could be availed in such a situation; that the goods were seized on 14.9.2006; that a provisional order came to be passed pursuant to the request of the NLC that they would execute a bond for Rs.23 crores and a bank guarantee for Rs.3 crores; that accordingly, they were furnished; that the goods were provisionally released, and final orders are not passed; that a show cause notice was issued on 12.3.2007; that according to NLC, they replied; that Rs.10,02,48,538/- is the differential duty; that penalty is also contemplated; that adjudication proceedings is to commence and yet to be

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completed; that after the adjudication of the entire proceedings, it will be made known, and there is all likelihood of confiscation of the goods as contemplated under the provisions of the Customs Act.

21.The Court paid its anxious consideration on the submissions made, and looked into all the materials available.

22.Admittedly, the petitioner participated in an auction conducted by the fifth respondent following an auction notice. The petitioner was the successful bidder. It is also admitted that following the earnest money deposit of Rs.13.20 crores, the entire balance of Rs.149,79,69,511/- was paid, and the auction sale was confirmed on 1.4.2005 on "As is where is basis". The petitioner has brought the request before this Court seeking to quash the auction sale and also for a direction to the second respondent to return the entire amount of Rs.163 crores and odd excepting Rs.38 crores which, according to the petitioner, was the value of the machineries removed by them from the plant. As could be seen above, the petitioner's case is mainly rested on the legal plea that the contract was void ab initio; that the fraud has been played by the second respondent by suppression of material facts which were within the special knowledge of the NLC, and hence, the consequence to follow should be a direction for return of the entire money. The case is resisted by the second respondent stating that the contract could not be performed in view of the interference by the Department of Central Excise and Customs; that after it was partly performed, the impossibility of performance arose, and hence, the contract was only voidable, if at all; that there was no fraud at all since there was no suppression of any fact; that even in the terms of auction notice, there was a clear stipulation where it was agreed by the parties to go for arbitration as envisaged under Clause 59; that in a case like this, the writ jurisdiction cannot be invoked; and that the petitioner must go either before the Court of civil law for the recovery of the sum or before the arbitration as advised. The State Trading Corporation who has filed proceedings under Sec.9 of the Arbitration and Conciliation Act before the Delhi High Court, has been impleaded as fourth respondent herein. According to the fourth respondent, it was the fourth respondent, who financed the entire transaction by advancing Rs.149 Crores, and hence, the interest of the fourth respondent must be protected. As far as the respondents 1 and 6 are concerned, the proceedings have been initiated by issuing show cause notice, and the property in question was originally put under confiscation, and pursuant to the request made by the second respondent by executing a bond for Rs.23 Crores and also a bank guarantee for Rs.3 Crores, the goods were released, and provisional assessment has been made, and now, the proceedings are pending.

23.At the outset, it has to be stated that the proceeding initiated by the fourth respondent for the recovery of the entire sum, which the fourth respondent financed for the transaction in question, is pending on the file of the High Court of Delhi, and an Arbitrator has been appointed, which is also pending in arbitral proceedings. At this juncture, no necessity arose for the Court to speak over the same. Further, there are two independent transactions noticed, one between the petitioner and the second respondent which culminated in the auction sale, and the other between the petitioner and the fourth respondent, who financed the

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transaction. The second transaction between the petitioner and the fourth respondent is a matter pending sub judice before the High Court of Delhi, and they have to work out the remedies before that Court. While adverting to the contentions put forth on either side, the first question that would arise for consideration would be whether the contract is void, voidable or void ab initio. It is not in controversy that the second respondent imported the machineries for its fertilizer plant. It is true that the fertilizer plant has been in existence from 1965. From the available materials, it would be quite evident that the materials were imported in the year 1999. It is also an admitted position that two notifications were issued in Nos.20/99 and 16/000 by the Customs Department pursuant to which the import of the machineries was made by the second respondent NLC. It could also be seen that the machineries were imported, and originally, concession was made on the duty on condition of the second respondent utilizing the machineries for its plant only and not for the purpose of sale.

24.Now, the provisions of the Customs Act are relevant at this juncture. Section 2(33) of the Customs Act, 1962, defines prohibited goods as follows:

> ""prohibited goods" means any goods the import or export of which is subject to any prohibition under this Act or any other law for the time being in force but does not include any such goods in respect of which the conditions subject to which the goods are permitted to be imported or exported, have been complied with;"

25.Sec.111(o) of the Customs Act is meant for confiscation of the improperly imported goods. Clause (o) reads thus:

> "any goods exempted, subject to any condition, from duty or any prohibition in respect of the import thereof under this Act or any other law for the time being in force, in respect of which the condition is not observed unless the non-observance of the condition was sanctioned by the proper officer;"

26.Once the goods were admittedly imported following the notification issued, and while the second respondent NLC desired to sell the same, it was duty bound to pay the entire Duty and get the clearance of the department, and if not done, the confiscation procedure, seizure of the goods and show cause notice for the non-payment all would naturally follow. In the case on hand, the second respondent cannot plead that it had no knowledge either about the notification or about the concession originally made, or the condition that the machineries should be utilized for the purpose of the plant, and if it is used for some other purpose or for sale, it must clear the Duties and get clearance from the department, and only then, it could be sold; otherwise, all the procedural formalities and the stringent provision under the law would follow. Further, the contention of the learned Counsel for the second respondent at this juncture, that a communication was first addressed by the NLC to both the Departments, namely, Central Excise and Customs on 24.5.2004 itself even one year before the auction, intimating them about their desire for the disposal of the fertilizer plant, and thereafter, there was a query made

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by the department, and following the same, a reply was submitted stating that all the particulars of the machinery along with the payment of Duty originally made, which cannot be an answer for the reason that those goods were imported goods pursuant to a notification stipulating certain conditions, and if the sale was to be made, even without the clearance of the entire Customs and Excise Duty, it would be nothing but not only breach of the conditions but also in violation of the stringent provisions of the Customs Act.

27.To the question whether the contract between the parties is void ab initio as contended by the petitioner's side, or voidable as contended by the second respondent's side, viewing from all the above factual positions, it has got to be declared as void ab initio. It would be more apt and appropriate to reproduce Sec.23 of the Indian Contract Act, 1872. Sec.23 reads as follows:

> "23.What considerations and objects are lawful, and what not:- The consideration or object of an agreement is lawful, unless-
> it is forbidden by law; or
> is of such a nature that, if permitted, it would defeat the provisions of any law; or
> is fraudulent; or
> involves or implies injury to the person or property of another; or
> the Court regards it as immoral, or opposed to public policy.
> In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void."

28.In the case on hand, the machinery has been imported, and there was a ban for sale of the property, and without the clearance from the Central Excise and Customs Department, it has been done. When the sale was made, it was forbidden by law. Under the circumstances, in view of the factual position, and applying Sec.23 of the Contract Act, it could be declared that it is a contract void ab initio.

29.The main grievance of the petitioner is that the second respondent has played fraud on the petitioner when the auction notice was issued. It is not in controversy that the machineries were imported pursuant to the notifications of the year 1999 and 2000 referred to above, and only concessional duty was paid on condition that it should be used by the second respondent for its own purpose. When it desired to sell the same, a communication was addressed. Following the same, a reply was also given by the department making a query. All these factual positions could have been only within the special knowledge of the second respondent NLC. But, the second respondent did not make any of the bidders including the petitioner, put on notice. Thus, it would be quite clear that the facts have been thoroughly suppressed. Now, it could be analyzed whether the suppression of these facts would constitute fraud. It would be more apt and appropriate to reproduce Sec.17 of the Contract Act which defines fraud as follows.

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"17."Fraud" defined:- "Fraud" means and includes any of the following acts committed by a party to a contract, or with his connivance, or by his agent, with intent to deceive another party thereto or his agent, or to induce him to enter into the contract:
(1)the suggestion, as a fact, of that which is not true, by one who does not believe it to be true;
(2)the active concealment of a fact by one having knowledge or belief of the fact;
(3)a promise made without any intention of performing it;
(4)any other act fitted to deceive;
(5)any such act or omission as the law specially declares to be fraudulent."

30.A reading of the above provision would make it abundantly clear that not only the representations either oral or written, but also the active concealment of a fact by one having knowledge or belief of the fact, would constitute fraud. In the instant case, the Officials of the NLC should have got the clear knowledge of the transactions, and therefore, a duty was cast upon them to bring to the notice of the auction purchasers including the petitioner, but not done so. Now, the contention put forth by the learned Counsel for the second respondent that they addressed a communication to the department; that they were waiting for the reply; that they presumed that there was no duty payable, and under the circumstances, the auction notice was issued and that too, it has been bonafide done cannot be accepted. It is a Public Sector Undertaking. As could be seen from the materials, the auction notice is the collective action from the lower most Official upto the top most Official. If to be so, while all the machineries, which were imported for a particular use following the notifications, were to be sold, clearance from the department first was a must; but, it was not done. If these material facts in respect of concealment, were expressed in terms by the second respondent, then the petitioner would not have opted to purchase the property. Needless to say, no one would have ventured to purchase when the auctioned property was under the clutches of law. Under the circumstances, there was concealment which is evident. Therefore, it is a case where NLC has actually concealed all the relevant facts which they were duty bound to bring to the notice, but have not done so.

31.Added circumstance is that after the sale was done, some of the Officials of the fourth respondent have also visited the NLC Directors in their office, and they had discussions with the second respondent's Directors. Even as per the books of accounts, the value of the goods is only Rs.17.75 crores. The valuer has given a certificate to the effect that the goods are worth about Rs.360 Crores. While the Directors of one Public Sector Undertaking namely the fourth respondent, had visited and had discussions with the Directors of the second respondent, at least at that time, that would have been properly brought to the notice. Had it been done, the fourth respondent another Public Sector Undertaking, would not have financed the transaction, but not done so. Under the

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circumstances, it would be quite clear that originally, the concealment of facts continued to exist for the reasons known to the second respondent NLC. Hence, these questions have got to be answered in favour of the petitioner.

32.While the above two questions are answered in favour of the petitioner, now, the question that would arise is whether the petitioner is entitled for the remedy as one asked for. Before adverting to that question, the contention put forth by the learned Counsel for the second respondent is that there is a clear Clause 59 wherein it is clearly mentioned that the parties have got to be referred to arbitration. Clause 59 reads as follows:

> "59) ARBITRATION: In the event of any dispute and/or difference arising between the Bidder/Purchaser/Buyer and/or their Agent as to the construction, interpretation and/or execution of the contract and/or the respective rights and liabilities of the parties, such disputes and/or differences shall be referred to the sole Arbitration of the Chief Executive of the Principal for a Company registered under the Companies Act in case of PSU or the Head of the Department in case of a Government Department/Ordnance Factory Board Units/Defence Unit, who may act himself or nominate in his place any Officer subordinate to him or of MSTC being not below the rank of General Manager/Director in the Government Department/General Manager in Defence Forces, who shall act as the Sole Arbitrator. The provision of The Arbitration and Conciliation Act, 1996, and the Rules there under shall apply to such Arbitration. The award passed by such Sole Arbitrator shall be final and shall conclusively bind all the parties."

33.Now, at this juncture, Clause 59 could be operative, in the opinion of the Court, if the contract is voidable. In a given case where the contract is voidable, the parties could be referred to arbitration even if the arbitration clause is also a part of the said contract. But, in the instant case, the contract itself is prohibited by law, and hence, it is void ab initio. In such a case, even if an independent clause is found for referring the parties to go for arbitration, the entire contract including the arbitration clause, in the opinion of this Court, would come to an end. Under the circumstances, the second respondent cannot have the benefit of the arbitration clause in an agreement which is void ab initio.

34.Both sides have placed their respective citations in this regard. They have also been perused. This Court is of the considered opinion that if the contract is voidable, the arbitration clause is operative, and the parties could be directed to go for arbitration proceedings. But, in the instant case, the contract itself is prohibited by law and has got to be declared as void ab initio. Hence, no question of directing the parties to go for arbitration giving effect to the Clause what is found in the course of the very same contract, would arise.

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35.The next question would be whether the relief as asked for by the petitioner, could be granted. Even all the above two questions were answered in favour of the petitioner, this Court feels that it is very difficult to answer this in favour of the petitioner. As far as this question is concerned, admittedly, there was a contract entered into between the parties, and pursuant to the same, the factory license was actually given to the petitioner on 11.5.2005. Pursuant to the deposit of the entire sum of Rs.149 Crores on 30.4.2005 according to the petitioner, it is not in controversy that the petitioner commenced operation of dismantling and removal of the goods. The total period given to the petitioner, was 370 days out of which, according to the second respondent, the petitioner has actually dismantled and removed for 369 days leaving one day. Now, even as per the averments in the petition, the petitioner has removed the materials worth Rs.38 Crores. Even in the relief clause, the petitioner has stated that it desired to have the refund of Rs.163 Crores excepting Rs.38 Crores which, according to the petitioner, is the value of the machineries removed by them. Now, at this juncture, according to the petitioner, the value of the machineries removed, was Rs.38 Crores. The learned Counsel for the second respondent took the Court to the communication addressed by the petitioner to the second respondent, seeking for extension of time wherein it has been stated that the petitioner has dismantled 75% of the machineries there. Now, at this juncture, the learned Senior Counsel for the petitioner tried to make an attempt to interpret the same that 75% refers only to dismantling and not removal. Further, the learned Senior Counsel for the petitioner in support of his contention that the materials removed, were only worth Rs.38 crores, relied on all the bills that have been signed at the time of the transportation of the materials from the NLC to outside. According to the second respondent, before the proceedings were initiated before the Delhi High Court, 100 lorries of machineries were transported, and thereafter, 37 lorries. Now, at this juncture, from the bills, it is quite evident that when the machineries were removed from the NLC, not only the petitioner signed the same, but also the Officials of the NLC have signed. A perusal of those bills would clearly reveal all facts except the value of the materials removed. Under such circumstances, in a case like this where the petitioner wants to have the entire amount to be refunded, unless and until the facts regarding the value of the machineries removed, are not certain, the Court cannot grant the relief.

36.In a case like this, where certain facts are disputed, and they have got to be established before a Court of law by adducing sufficient proof, this Court cannot grant the relief. As contended by the learned Senior Counsel for the petitioner, merely because an alternative remedy is available, a party need not be driven to a Court of civil law, if certain facts are disputed, and those facts could be shown by the proof available, and even if a writ is asked for based on a contractual obligation and also for a monetary relief. But, in this case, the facts as narrated above, would indicate that the petitioner comes forward to show the valuation of the materials removed only as Rs.38 Crores while the second respondent would say that major part of the machineries have been removed. Under the circumstances, while that fact is in dispute, it cannot be decided by a writ Court, and also it could be decided only by a Court of civil law by

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looking into and appreciation of evidence adduced by both the parties, both oral and documentary. Under the circumstances, though this Court is able to see sufficient force in the contention put forth by the petitioner's side in the first part of the case, the second part as to the relief asked for, namely return of the amount, this Court is unable to accept the case of the petitioner and to grant the relief.

37.Now, at this juncture, after the pronouncement of the above order, the learned Senior Counsel for the fourth respondent would submit that it is also a public sector undertaking; that Rs.149 Crores has flown from the fourth respondent; that now, the entire amount is in the hands of the second respondent; that since the entire contract is declared as void ab initio, the second respondent is not entitled to have any money which has already flown from the fourth respondent; and that in order to protect the interest of the fourth respondent, necessary orders have got to be passed.

38.In answer to the above contention, the learned Counsel for the second respondent would submit that the present petition is filed by the petitioner on the strength of the contract entered into between the petitioner and the second respondent in which the fourth respondent is not a party; that apart from that, the fourth respondent has already laid action against the petitioner herein before the High Court of Delhi, where the second respondent is also shown as a party, and interim reliefs have been granted already, and hence, the fourth respondent should work out its remedy before the Delhi High Court and cannot ask for any relief in this petition.

39.As far as the above contention of the fourth respondent is concerned, this Court is of the considered opinion that since the claim for the entire sum is pending in the hands of the High Court of Delhi, where the second respondent is also a party, the fourth respondent can seek for appropriate and further reliefs in the High Court of Delhi where the proceedings initiated by the fourth respondent, is already pending.

40.In the result, this writ petition is dismissed. No costs. Consequently, connected MPs are also dismissed.

nsv/

Sd/
Asst. Registrar

/true copy/

Sub Asst.Registrar

To:

1.The Secretary, Union of India
Ministry of Coal & Mines
Central Secretariat, New Delhi

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2.The Deputy General Manager
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5.M/s.Metal Scrap Trading Corporation
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